UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
WASHINGTON, D.C. 20001

Date: February 2, 1998

CASE NO.: **97 INA 074**

In the Matter of:

ROSEDALE DENTAL CENTER,
Employer

on behalf of

CATHERINE RAPATALO,
Alien

Appearance: Jack Golan, Esq., of Los Angeles, California.

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of CATHERINE RAPATALO ("Alien") by ROSEDALE DENTAL CENTER ("Employer") under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On May 1, 1995, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Bookkeeper/Bilingual" in its Dental Office. AF 42. The job was classified as Bookkeeper under DOT Occupational Code 210.382-014. The Employer's Special Requirements were a high school education and two years of experience in the Job Offered and fluency in the Tagalog language.[3]

> Maintain up-to date records and financial information for Management to show statistics & prepare dental bills for various Agencies & Insurance Co.'s. S/he will: analyze and reconcile accounts; verify and record details of transactions to reflect status of accounts based on records, in-voices, inventory records and requisitions; maintain and prepare records of accounts receivable & payable, trial balances, quarterly reports, profit & loss statements, pay-roll and bank reconciliation, and file reports with Govern-ment Agencies as needed; prepare bills based on patient's records and submit to Insurance company's and/or Medical and Medicare; explain bills and charges to patients by use of Tagalog language as needed.

AF 42.[4] Although a total of thirteen U. S. workers were referred for the job, none of them were hired. AF 41, 49-57.

Notice of Findings. In the April 24, 1996, Notice of Findings ("NOF"), the CO advised that certification would be denied subject to rebuttal because at least one U. S. worker was qualified and available at the time and place where the job was to be performed The CO found that Ms Lomibao, an apparently qualified U. S. worker was rejected for reasons that were neither lawful nor job-related, citing 20 CFR §§ 656.21(b)(6), 656.21(j) (1), and 656.24(b)(2)(ii).

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[2]Administrative notice is taken of the Dictionary of Occupational Titles (DOT), published by the Employment and Training Administration of the U. S. Department of Labor.

[3]The Employer said two years of college education in accounting could be substituted for one year of the required experience.

[4]It appears that the Employer's discussion of the need for fluency in the foreign language in AF 45-48 was sufficient to persuade the CO of its business necessity.

Noting, *inter alia*, the Employer's contention that she lacked knowledge in the preparation of Quarterly Tax Returns, the CO said the job duties for the position do not require such expertise and inferred that her rejection was based on a previously undisclosed requirement in violation of 20 CFR §§ 656.21(b)(65) and 656.21(j)(1). Pointing to a limited knowledge of payroll processing, the CO explained that Ms Lomibao was not required to have experience in each and every duty listed in Employer's job description. On the other hand, based on her thirty-three years of experience in Accounting and Bookkeeping, baccalaureate degree in Science in commerce with a concentration in accounting, and her qualification as a certified public accountant in the Philippines, the CO concluded that this applicant could perform the job duties within a reasonable on-the-job training period, citing 20 CFR § 656.24(b)(2)(ii).

The CO then took up and rejected Employer's stated reasons for rejecting this worker, explaining that they were subjective, unsubstantiated, discriminatory under 20 CFR § 656.20(c)(5), and were not in good faith, citing 20 CFR §§ 656.21(b)(6) and 656.21 (j)(1). Concluding that this job opportunity was not open to any qualified U. S. worker within the meaning of 20 CFR § 656.20(c) (8), and stated the corrective actions the Employer must undertake to rebut these findings.

Rebuttal. The Employer's May 23, 1996, rebuttal addressed the issues stated in the NOF. AF 27-35. The Employer's primary argument was that the U. S. worker was not able to carry out the payroll functions that it contended were "a core duty of the position offered," rejecting all of the reasons stated in the NOF as "just verbal froth on the surface of this case." AF 27. The Rebuttal statement by Counsel were based on Employer's statement that,

> The preparation of payroll and filing of payroll taxes is not just one of the job duties. This is a **core** duty for a bookkeeper in my office.
>
> ... I believe that as an employer in the United states I am entitled to decide which of the qualifications of a job applicant are useful to me.

AF 34. (Emphasis as in the original.)

Final Determination. On June 27, 1996, the CO's Final Determination denied certification on grounds that Employer's rebuttal failed to present sufficient evidence to remedy the defects found in this application for alien labor certification, as explained in the NOF, and that the Employer failed to sustain its burden of proving that there were no qualified U. S. workers available after having made a good faith test of U.S. worker availability. First, the CO found that the Employer failed to establish that preparation of a payroll and filing payroll taxes is a "core" or major job duty of the position. As the resume of the U. S. applicant showed several years of experience in supervising payroll departments and preparing quarterly payroll tax deposits, the CO inferred that she was qualified in this area as the record contained no persuasive contrary evidence.

Second, because the Employer failed to rebut several NOF findings, the CO deemed them to have been admitted:

(1) the CO inferred in the NOF that, even if the U. S. worker lacked specific qualifications in the preparation of Quarterly Tax Returns, this would not be a lawful basis for her rejection because Employer's statement of the job duties did not specifically require preparation of Quarterly Tax Returns. Consequently, the CO reasoned that the U. S. worker's rejection was based on a previously undisclosed requirement and was contrary to 20 CFR §§ 656.21(b)(6) and 656.21(j)(1).

(2) Employer's opinion that the U. S. worker was seeking a temporary job until she could qualify for retirement was unsubstantiated by any evidence. As a result, it was not a lawful, job-related reason for her rejection under 20 CFR § 656.21(j)(1), and it appeared to discriminate again this worker on account of her age under 20 CFR § 656.20(c)(5).

(3) The Employer's inference that the U. S. worker was unable and unwilling to work in a "fast paced environment" was inconsistent with the candidate's background in handling accounting work for several companies at a time. For this reason it was not a lawful, job-related reason for her rejection under 20 CFR § 656.21(j)(1).

(4) As the Employer's refusal to hire this qualified U. S. worker was based on subjective criteria and unsubstantiated opinions suggested that the Employer did not engage in good faith recruitment under 20 CFR § 656.21(b)(6), the CO concluded that this job was not open to any qualified U. S. worker under 20 CFR § 656.20(c)(8).

Appeal. The Employer's letter of July 16, 1996, appealed on grounds that the CO erred in concluding (1) that payroll duties are not a core duty of the position; (2) that the duty of filing payroll tax forms was an undisclosed duty; (3) that the Employer failed to rebut and therefore admitted the findings that the CO reported in the NOF; (4) that the Employer had subjective and unsubstantiated reasons for rejecting the U. S. candidate for the job; and (5) that the CO did not accept the Employer's reasons Employer gave to explain its rejection of the U. S. candidate as job-related.

Discussion

20 CFR § 656.24(b)(2)(ii) provides that a U. S. worker is considered qualified for the position if, based on education, training, and experience, he is able to perform the job in a normally accepted manner. In general, the applicant is considered qualified for the job if he meets the minimum requirements specified for the job in the labor certification application. **United Parcel Service**, 90 INA 090 (Mar. 28, 1991); **Mancillas International Ltd.**, 88 INA 321 (Feb. 7, 1990); **Microbilt Corp.**, 87 INA 635 (Jan. 12, 1988). An employer's rejection of a U. S. worker who satisfies the minimum requirements specified in the ETA 750 A and in the advertisement for the position is unlawful for this reason. **American Cafe**, 90 INA 026 (Jan. 25,

1991); **Cal-Tex Management Services**, 88 INA 492 (Sep. 19, 1990); **Richco Management Inc.**, 88 INA 509 (Nov. 21, 1989); **Dharma Friendship Foundation**, 88 INA 029 (Apr. 7, 1988). On the other hand, the employer may reject a U. S. worker who meets the minimum specified requirements, if it presents objective detailed reasons for concluding that the applicant could not perform the core job duties. **Formosa Plastics Corp., U.S.A.**, 91 INA 141 (Aug. 14, 1992). Mere general experience in the particular field of endeavor is not necessarily sufficient where it is clear that the U. S. job applicant cannot perform all the job duties. **Taiwan Imports**, 90 INA 213 (Feb. 5, 1992).

There is sufficient evidence in her resume to find that Ms. Lomibao was qualified for the position at issue in that she met the Employer's stated requirements as to both education and experience. Her employment history indicated that for three and one-half years her work as an Assistant Director of Finance for Health Care Delivery Services, Inc., included among her other duties the supervision of the payroll department of that firm.
AF 72. During her employment as Intermediate Accountant to the Controller for more than six years (1/75-4/87) she prepared the quarterly payroll tax deposits for several large corporations.
AF 73. Employer's Rebuttal did not add to the record any credible evidence that contradicts this resume.

The Employer did not contradict the CO's findings, in spite of its assertions on appeal. Instead, during the job interview, Dr. Quimon said she would reject Ms. Lomibao because she "might not be happy in being [in a] small company." AF 67.[5] Contrary to the assertions in its appeal, Employer's only sole reference to any payroll work in this application was that the worker was to "maintain and prepare records of ... payroll and bank reconciliation, and file reports with Government Agencies as needed ... ." AF 42. The same language was incorporated in the Employer's advertisement for the position. AF 59-63.

These documents were not contradicted by any evidence in the Employer's Rebuttal. The Employer's contentions do not contradict the CO's findings, notwithstanding its assertions on appeal. The first mention of the work of processing a payroll was in the Employer's Statement of Recruitment Efforts. The entire reference was, "I asked her job related questions and it proved that she has very limited knowledge in the processing of payroll." AF 55. This finding is not persuasive because it is vague and is not based on any objective facts of record. It is not credible for the further reason that any contention that she lacked knowledge in the preparation of Quarterly Payroll Tax Returns is contradicted by the language quoted from the Ms. Lomibao's resume, *supra*.

After a detailed examination of the Appellate File, we find that the record contained

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[5]There was more than one interview. In the second session Employer administered a test on accounting, the results of which were never revealed in evidence included in the Appellate File. Even though the absence of evidence prevented this test from being noted in the NOF, the Employer argued that the test was needed because she was choosing among three applicants out of the more than twelve candidates who had applied. AF 68.

sufficient evidence to support the CO's finding that there is no reason to credit Employer's assertions (1) that payroll preparation was a core function or (2) that Ms. Lomibao lacked the accounting background necessary to perform the payroll preparation and the other job duties enumerated in its application and advertisement. Consequently, we conclude that the CO's denial of certification is supported by the evidence of record.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.